

THE OVERALL ALBANIAN LEGAL FRAMEWORK OF COMPETITION

OGÓLNE PRAWNE WARUNKI KONKURENCJI W ALBANI

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Abstract. This paper aims to reflect and analyze developments in the legal and institutional framework of competition in Albania bringing the author's point of view based on various documents, legal acts and numerous papers of different authors. This paper also seeks to identify the results achieved by the implementation of the new legal and institutional Albanian framework, regarding the fact that since 2004 Albania has been applying competition law/policy as an economic regulation that affects both the structure of markets and the conduct of market participants. Albania is a small European country, which since the entry into force of the SAA, has been legally obliged to fulfill the so-called "Copenhagen criteria", namely: political criteria (democracy, rule of law, human rights, protection of minorities) and economic criteria (functioning market economy and capacity to cope with competition pressure within the internal market of the European Union). In this context Albania has made some good progress in developing a stable and functioning market economy, however, there is significant room for further improvement in many aspects. The Albanian economy appears to have most of the basic building blocks of a functional competition policy regime, though some gaps persist and enforcement records appear limited. Aiming at the EU market, Albania is a latecomer and, above all, enters a market that is highly competitive and very demanding with regard to quality, reliability and efficiency of supply.

Keywords: Albanian Competition Authority, competition, EU, legal framework, policy

Streszczenie. Niniejszy artykuł ma na celu odzwierciedlenie i analizę zmian prawnych i instytucjonalnych warunków konkurencji w Albanii, prezentując punkt widzenia autora na podstawie różnych dokumentów, aktów prawnych i artykułów różnych autorów. Albania jest małym krajem europejskim, który od wejścia w życie *Układu o Stabilizacji i Stowarzyszeniu* był prawnie zobowiązany do spełnienia tzw. "kryteriów kopenhaskich", a mianowicie: kryteriów politycznych (demokracja, praworządność, prawa człowieka, ochrona mniejszości) oraz kryteriów ekonomicznych (funkcjonująca gospodarka rynkowa i zdolność do radzenia sobie z presją konkurencji na rynku wewnętrznym Unii Europejskiej). W tym kontekście Albania poczyniła znaczne postępy w rozwijaniu stabilnej i funkcjonującej gospodarki rynkowej, jednak istnieje wiele możliwości dalszej poprawy w wielu aspektach. Wydaje się, że gospodarka albańska ma większość podstawowych elementów funkcjonalnej polityki konkurencji, chociaż istnieją pewne luki, a zapisy dotyczące egzekwowania przepisów wydają się ograniczone. Dążąc do rynku UE, Albania jest spóźniona i przede wszystkim wchodzi na rynek, który jest wysoce konkurencyjny i bardzo wymagający pod względem jakości, niezawodności i wydajności dostaw.

Słowa kluczowe: Albański Urząd ds. Konkurencji, zawody, UE, ramy prawne, polityka

Introduction

Albania has gone through many important changes during the last two decades. In June 2014, the European Council granted Albania candidate status. *The Stabilization and Association Agreement* (SAA) has been in force since April 2009 and Albania

has smoothly implemented its obligations. Regular political and economic dialogue between the EU and Albania has continued through the relevant structures under the SAA. Referring to the recommendations of the *European Commission Report*

in 2016, the government engaged in EU-related reforms and continued to make progress in meeting the objectives set out in the five key priorities for the opening of accession negotiations (European Commission, 2016).

The European Commission addressed five key determinant priorities: 1 – establishment of a professional and depoliticized administration; 2 – enhance the impartiality of the judiciary; 3 – strengthen the fight against organized crime; 4 – strengthen the fight against corruption; 5 – reinforce protection of human rights.

In this context the SAA provides the agenda of reforms that Albania has to implement in the process of its integration with the European Union. The key element of the integration process is the harmonization of Albanian legislation with European law, and some of the most important parts are the SAA chapters on economic and commercial provisions including competition law clauses. The obligation to approximate European standards within Albanian competition policy is provided for in art. 70 and art. 71 of the SAA, and some of the main requirements in this area include further convergence of legislation, empowerment of the national competition authority, and enhancement of its autonomy and building its administrative capacity. All of these requirements reflect the direct link between an effective competition policy and the existence of free market economy as a precondition for accession to the European Union (Broka & Laci, 2010).

Material and methods

This article aims to reflect and analyze developments in the legal and institutional framework of competition in Albania bringing the author's point of view based on various international documents, EU legislation, surveys, legal acts, domestic law and numerous papers of different authors. This paper is attempting to carry out a multi-level analysis concretely in terms of: identification of specific legislation; passing on the best experience referred to contemporary legislation; and highlighting the positive and negative sides of the competition in Albania. The descriptive method that has been applied since the initial stage of the article has served to describe the findings of the research and analysis in the work, adapting them to the function of realizing the purpose of the article.

Results and discussion

The development of the Albanian legal competition framework

The development of the Albanian competition framework reflects the political and economic changes in the country during the years after the fall of communism and has been very much influenced by the progress of Albania's integration into the European Union (UN 2015).

Competition, which by definition, includes sustaining a balance between supply and demand of goods and services is considered a major mechanism of the market economy. A group of authors argue that effective competition is the engine forcing the economic agents to act in the most efficient way under the competitive pressure that threatens them to be pushed out, or eliminated from the respective market (Penev, Marušić, Mancellari, Milović, Čaušević & Hy-seni, 2013).

Competition legislation aims to prevent distortions of competition that harm the economy and, at the same time, to assure freedom of choice of economic agents (Gasparikova, 2011). In a market economy, competition is a process whereby firms compete against each other for securing consumers for their products. A competition policy should include both:

- (i) *Economic policies* adopted by the Government, that enhance competition in local and national markets, and
- (ii) *Competition law* designed to stop anti-competitive business practices (Mehta, 2011).

The first competition law was adopted in 1995. Albania was one of the first countries from the Western Balkans to have drafted their own national competition laws. The Competition Act of 1995 has provided the foundations of the institutionalization of a competition policy in Albania by providing for the establishment of the first public body to deal with competition protection in the country: the Directorate of Economic Competition. This, however, was not a completely independent institution, as it was part of the Ministry of Trade and Tourism.

Most of the provisions contained in the first competition law of Albania remained only on paper and were not applied in practice. Several reasons could be underlined to explain the lack of implementation of this law: the lack of public awareness of the existence of the competition act; the lack of institutional independence of the body in charge of its enforcement; the gaps and noncompliance with European

Union standards, mixing of different legal institutes into one law, causing ambiguities and contradictions in the legal provisions; and the specific economic and political situation in the country during the 1990's. This period can be considered the first phase of the emergence of competition in Albania.

After 2000, it became clear that there was a need for institutional and legal amendments in the area of competition. While the competition policy had developed during that period, the competition legislation had gaps and was a far cry from the European Union competition legislation, institutions and policies. It became clear that mere amendments to the existing legislation would simply not be enough: a new law on competition protection and promotion was needed, in which anti-competitive rules would play a key role, and the implementation of which would be ensured by an independent authority (Gruda & Melani, 2010).

The second competition law was approved in 2003 with the main objective to protect free and effective competition in the market place, to define the rules of conduct by undertakings, as well as the institutions responsible for protection of competition and their competencies (On Competition Protection Act 2003). This law is based on the Albanian Constitution, which specifies in article 11 that the economic system of the Republic of Albania is based on private and public property, as well as on a market economy and on the freedom of economic activity. The new law created conditions for considerable improvements of the legal and institutional framework of the competition in the country with a view to guaranteeing effective implementation of competition policy. The Law is based on three main pillars:

- Agreements of serious consequences on the market (cartels),
- Abuse of dominant position and
- Concentrations.

To realize its main objective, the competition act declares itself applicable to all undertakings and associations of undertakings, which directly or indirectly have or may have an influence in the market; public undertakings and undertakings that have been granted exclusive or special rights by the State; and undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly insofar that in law or in fact their activity is not obstructed by the application of competition rules (United Nation, 2015).

Comparing the two stages of development of the 'market economy' in Albania in 1995 and 2003 as well as the respective sets of competition legislation

(laws and the respective secondary legislation), one conclusion is made clear: *The more progress is made in the transition (structural) reforms, the more important competition law and competition policy becomes.* In the first stages of transition, a simple mechanism of a market competition was installed through price liberalization, trade liberalization and privatization reforms, supported by the respective legislation including the 1995 law on competition. In the latter stages of transition, the reforms (including those in the financial sector and also liberalization in utilities and infrastructure sectors) are more complex, and so is the functioning mechanism of the market economy. So may also be the behaviour of the market players supplying goods and services (Penev, Marušić, Mancellari, Milović, Čaušević & Hyseni, 2013).

A very important step forward was the establishment of an independent national competition Authority empowered to fully enforce the law (Broka & Laci, 2010). This step can be considered the second phase of development and institutionalization of the competition law. The Competition Act of 2003 was amended in 2010 with a view to achieving further approximation with European Union legislation and to improving its practical implementation (Broka & Nazifi, 2011). In conclusion, The Competition Act of 2003 is a solid base for an effective competition policy in Albania. However, its implementation is made possible only on the instrumental bases of the relevant secondary legislation.

Referring to the fulfillment of obligations, institutional initiatives and recent developments, the European Commission notice and analyzes in 2016, that Albania has some level of preparation concerning its capacity to cope with competitive pressure and market forces within the Union. According to the European Commission some of the main findings of the Report are as below: Albania has some level of preparation/ is moderately prepared in competition policy.

There is some progress on legislative alignment in all areas. However, significant efforts are needed to improve legislative alignment and enforcement in the area of State aid. The legislative framework is broadly in line with the *acquis* and the provisions of the Stabilization and Association Agreement. The law on protection of competition is largely aligned with Article 101 on restrictive agreements and Article 102 on abuses of dominant position of the Treaty on the Functioning of the European Union (TFEU, 2007). Secondary legislation providing further substantive rules and guidance on how competition rules should be applied is broadly in line with the relevant EU regulations and Commission guidelines. The conclusions, remarks

and suggestions of the European Commission of 2016 are particularly important because of the analytical approach towards the competition policy in Albania.

The Albanian Competition Authority

All developments in a market economy and rules affecting the behaviour of the market agents are reflected in the effectiveness of competition policy. The institutions directly involved in the protection and promotion of competition are the Assembly (particularly the Committee for Economy and Finance, and the Committee for the European Integration), the Competition Authority which is directly responsible for the implementation of the law, and the Tirana District Court. An important role is also played by central and local administrative bodies and also regulatory entities and other regulatory institutions (Penev, Marušić, Mancellari, Milović, Čaušević & Hyseni, 2013).

One of the most important bodies is the Competition Authority, the main body that enforced Competition policy in Albania. It is also the national authority responsible for the enforcement of Community acquis in the process of Albania's integration in the European Union (On Competition Protection Act 2003). The Authority is both a public and legal entity, independent when performing its tasks. Formally, it is an operationally independent authority reporting to parliament. Its chair and four board members are appointed by parliament. The Authority is composed of two bodies, and the duties of each are clearly defined by law: The Commission, a decision-making body and The Secretariat: an administrative and investigative body, so that both are functionally separated within the Authority's unitary organizational structure and which is approved by the Albanian Parliament. The functional separation between the Competition Commission and the Secretariat is established with a view to guaranteeing procedural fairness and effectiveness in competition law enforcement.

The Albanian Competition Authority is subjected by law to start investigation procedures on its own initiative. It has adequate investigative powers, similar to those of the European Commission. In the field of restrictive agreements, similarly to the European Commission's powers, the Competition Act has been amended in order to empower the national competition authority with the ability to grant not only individual exemption from the general prohibition, but also to block exemptions to certain categories of agreements between undertakings, as well as to apply de minimis rule towards the agreements of minor impact on competition.

The competence of the Authority, which is exercised by the decision-taking body, includes the following duties: Outlines the national competition policy; Approves regulation on the internal functioning of the Authority; Supervises the Secretariat in the application of the competition law; Takes decisions on the basis of the competition law; Issues regulations and guidelines for the implementation of the law; Submits the Authority's annual report to Parliament; Gives opinions to Parliament on competition-related issues; Gives recommendations to public administration and non-governmental organizations on competition; Represents the Authority in its relationships with its counterparts; Sets the priorities of investigations and the related deadlines.

The decision-making of the Authority, in its 14 years of existence, has covered all sectors of the Albanian economy. Problems arising from the investigation in all cases are accompanied by appropriate measures and recommendations. More than 480 decisions have been taken since 2004 to date by the Competition Commission.

Besides the Competition Authority, the Tirana District Court is also empowered to apply competition rules. The court can take action even if the competition authority initiates action. But, requests for exemption from prohibition of an agreement and the procedures for the control of concentrations are not within the jurisdiction of the court. Also Albanian Competition Authority decisions can be reviewed by the Administrative Court of First Instance of Tirana, which decides both on the merits and on procedural aspects of the cases.

Pursuant to "On Competition Protection Act 2003", the Albanian Competition Authority has developed the relevant regulations, with GTZ and EU expert support, which were then approved by the Competition Commission. The preparation of the secondary competition legislation in line with European Union principles completed the legal framework, enabling the full functioning of the Competition Authority as an independent public institution that is responsible for the protection of free and effective competition.

Following the commitments undertaken by Albania within the process of its European Union integration, the Authority has set the approximation of the national competition law to the European rules among its most important priorities. Within this part of its operation, the Authority prepares and adopts acts of secondary legislation (regulations) or soft-law (guidelines) by which it transposes European Union competition standards into the national legislation,

with a view to establishing a legal and institutional framework to allow Albania to integrate into the internal market of the European Union. In this regard, the Authority is in constant contact with the Ministry of European Integration and submits regular reports on the progress it has made with the time frame of the National Implementation Plan, where a description is given as to the degree of alignment with the European Union law of all national legal acts in the area of competition.

Conclusions

Albania has a modern legal and institutional framework for competition protection, which is constantly being aligned with European Union competition law. The involvement of the Authority in regulatory reforms and the implementation of competition advocacy by providing numerous recommendations to sector regulators undoubtedly have beneficial effects on the functioning of the relevant markets.

A good competition law is not sufficient by itself, as it can be effective only if it is properly enforced. The Albanian Competition Authority should have the necessary power and tools to uncover illegal practices and impose sanctions for infringements, to prevent or remedy mergers that may lead to reduced competition, and to advocate a more competitive environment.

The Albanian Competition Authority is formally independent and in recent years, the government has given no binding directions as to whether it should open investigations or impose sanctions, nor has it overturned any decision by the Albanian Competition Authority.

Publishing explanatory documents that help businesses, their legal advisers and the public to understand how competition law is applied is an important aspect of enforcement practice. However, the Albanian Competition Authority has published few or, in some cases, no guidelines to that effect.

The absence of enforcement guidelines could be the result of insufficient enforcement practice, since guidelines are the fruit of experience, best national practices and case law.

Overall, Albania appears to have laid most of the basic building blocks for a functional competition policy regime. Some challenges persist, however. The enforcement record is among the most important indicators of an effective competition regime and Albania has room for further improvement in that regard.

Guidance for stakeholders on enforcement practices could also be improved by publishing explanatory documents that help businesses, their legal advisers and the public to understand how competition laws are applied.

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